

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

IN RE: COMPLAINT AND PETITION	§	
FOR RELIEF OF BELL SOUTH	§	
TELECOMMUNICATIONS, LLC d/b/a	§	
AT&T SOUTHEAST d/b/a AT&T	§	DOCKET NO. 2011-304-C
SOUTH CAROLINA v. HALO	§	
WIRELESS, INCORPORATED FOR	§	
BREACH OF THE PARTIES'	§	
INTERCONNECTION AGREEMENT	§	

**HALO WIRELESS, INC.'S PARTIAL MOTION TO DISMISS; NOTICE OF
MAY 16, 2006 ORDER CONFIRMING PLAN OF REORGANIZATION OF
TRANSCOM ENHANCED SERVICES AND MOTION TO DISMISS; AND ANSWER
TO THE COMPLAINT OF BELL SOUTH TELECOMMUNICATIONS, LLC D/B/A
AT&T SOUTH CAROLINA**

COMES NOW Halo Wireless, Inc. ("Halo") and files this its Partial Motion to Dismiss; Notice of May 16, 2006 Order Confirming Plan of Reorganization for Transcom Enhanced Services and Motion to Dismiss; and Answer (the "Answer") to the Complaint of BellSouth Telecommunications, LLC, d/b/a AT&T South Carolina ("AT&T") (the "Complaint"), respectfully requesting that the South Carolina Public Service Commission (the "Commission") dismiss Counts I, II, and III of the Complaint.

**HALO WIRELESS, INC.'S PARTIAL MOTION TO DISMISS
COUNTS I, II, AND III OF THE COMPLAINT OF BELL SOUTH
TELECOMMUNICATIONS, LLC D/B/A AT&T SOUTH CAROLINA**

I. Preliminary Statement.

1. Halo is a commercial mobile radio service ("CMRS") provider. Halo has a valid and subsisting Radio Station Authorization ("RSA") from the Federal Communications Commission ("FCC") authorizing Halo to provide wireless service as a common carrier. AT&T has filed a complaint that it claims to be a post-interconnection agreement ("ICA") dispute.

**HALO WIRELESS, INC.'S PARTIAL MOTION TO DISMISS; NOTICE OF MAY 16, 2006 ORDER
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TELECOMMUNICATIONS, LLC D/B/A AT&T SOUTH CAROLINA**

While the parties do have an ICA in South Carolina, Halo contends that AT&T's Counts I, II and III do not really seek an interpretation or enforcement of those terms. As explained further below, AT&T is impermissibly and improperly seeking to have the Commission decide whether Halo is acting within and consistent with its federal license. The Commission, however, lacks the jurisdiction and capacity to consider that topic.

2. In addition, Halo sells CMRS-based telephone exchange service to Transcom Enhanced Services, Inc. ("Transcom"),¹ Halo's high volume customer. As explained further below, AT&T's Counts I, II and III do not actually seek an interpretation or enforcement of the ICA terms. Instead, AT&T is impermissibly and improperly seeking to have the Commission decide whether Transcom is "really" an Enhanced/Information Service Provider, because if Transcom is an end user then there can be no dispute that the traffic in issue does originate "through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T..." ICA (quoted in Complaint ¶ 9). The Commission, however, lacks the jurisdiction and capacity to take up the issue of whether Transcom is "really" an ESP because (1) AT&T is precluded as a matter of law from disputing Transcom's ESP status and (2) the issue is governed by federal law and only the FCC or a federal court may resolve it.

3. As discussed below, on four separate occasions, courts of competent jurisdiction have ruled that Transcom is an Enhanced Service Provider ("ESP") *even for phone-to-phone calls*² because Transcom changes the content of every call that passes through its system, often changes the form, and also offers enhanced capabilities (the "ESP rulings"). The court directly construed and then decided Transcom's regulatory classification and specifically held that

¹ Halo has other CMRS customers as well, but it is likely that AT&T's Complaint does not address those customers.

² Transcom also has a very significant and growing amount of calls that originate from IP endpoints.

Transcom (1) is not a carrier; (2) does not provide telephone toll service or any telecommunications service; (3) is an end user; (4) is not required to procure exchange access in order to obtain connectivity to the public switched telephone network (“PSTN”); and (5) may instead purchase telephone exchange service just like any other end user. Three of these decisions were reached after the so-called “IP-in-the-Middle” and “AT&T Calling Card” orders³ and expressly took them into account. The courts ruled that Transcom is an end user, not a carrier. AT&T was a party to each of those proceedings and is bound by those decisions.

4. Halo is selling CMRS-based telephone exchange service to an ESP end user. All of the communications at issue originate from end user wireless customer premises equipment (“CPE”) (as defined in the Act, 47 U.S.C. § 153(14))⁴ that is located in the same MTA as the terminating location. The bottom line is that not one minute of the relevant traffic is subject to access charges. It is all “reciprocal compensation” traffic and subject to the “local” charges in the ICA. Further, and equally important, the ICA uses a factoring approach that allocates as between “local” and “non-local.” Halo has paid AT&T for termination applying the contract rate and using the contract factor. AT&T cannot complain.

5. Multiple telecommunications companies, including TDS, AT&T, and other ILECs do not like the arrangement between Halo and Transcom. They want the Commission and other commissions across the country to rule that Halo’s service is “not wireless” and “not

³ See Order, *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, 19 FCC Rcd 7457 (rel. April 21, 2004) (“AT&T Declaratory Ruling” also known as “IP-in-the-Middle”); Order and Notice of Proposed Rulemaking, *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services Regulation of Prepaid Calling Card Services*, WC Docket Nos. 03-133, 05-68, FCC 05-41, 20 FCC Rcd 4826 (rel. Feb. 2005) (“AT&T Calling Card Order”).

⁴ Stated another way, the mobile stations (*see* 47 U.S.C. § 153(28)) used by Halo’s end user customers – including Transcom – are not “telecommunications equipment” as defined in section 153(45) of the Act because the customers are not carriers. Halo has and uses telecommunications equipment, but its customers do not. They have CPE.

CMRS.” However, as discussed more fully below, only the FCC has jurisdiction to make such determinations. Despite this fact, TDS, AT&T, and multiple other ILECs have coordinated a multi-state attack on Halo and Transcom involving more than 100 ILECs suing Halo (and sometimes Transcom) in 20 different proceedings in 10 states, in all cases accusing Halo and Transcom of an “access charge avoidance scheme,” without bothering to mention that Transcom has been ruled to be an ESP. In all the cases, the ILECs accuse Halo and Transcom of manipulating call stream data when they know that is not true. Neither Halo nor Transcom makes any changes to Called Party Number (“CPN”). Halo populated the charge number field with Transcom’s number because Transcom is Halo’s end user customer, and the applicable industry standards call for this practice.

6. Halo’s business model will bring 4G WiMAX broadband to unserved or underserved rural areas in many parts of the country without government subsidies, and for about the same cost as those consumers are paying now for basic telephone service. Meanwhile, Transcom’s services lower the cost of communications to its customers, and this lower cost benefits users, including users in South Carolina. Halo and Transcom have a solid legal foundation for their business models, and those business models benefit consumers. That this result impacts the ILECs’ *pecuniary* interest does not mean that Halo’s services and Transcom’s services are not consistent with the *public’s* interest. Congress chose to allow competition. Any competitive entry will necessarily reduce the ILECs’ revenues. Any decision that equates the ILECs’ pecuniary interest with the public interest will necessarily mean that the Commission believes Congress’ “competition experiment” was in error.

7. The underlying dispute is controlled by federal law, which therefore preempts any state disposition of these issues. The FCC has made it clear that decisions affecting federal

telecom licensees like Halo, and their services, are not entrusted to the state commissions because doing so is impractical and would make deployment of nationwide wireless systems like Halo's "virtually impossible."⁵

8. The courts have agreed that state commissions cannot attempt to impose rate or entry regulation on wireless providers, and in particular, state commissions cannot issue "cease and desist" orders on wireless providers. *Motorola Communications & Electronics, Inc. v. Mississippi Public Service Com.*, 515 F. Supp. 793, 795-796 (S.D. Miss. 1979), *aff'd* *Motorola Communications v. Mississippi Public Service, Comm.*, 648 F.2d 1350 (5th Cir. 1981). Further, Halo has a *federally*-granted right to interconnect and the FCC has asserted "plenary" jurisdiction over CMRS interconnection and expressly pre-empted any state authority to deny interconnection. Declaratory Ruling, *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Report No. CL-379, FCC 87-163, ¶¶ 12, 17, 2 FCC Rcd 2910, 2911-2912 (FCC 1987) ("*RCC Interconnection Order*").

9. The regulatory classifications for Halo and Transcom are defined and governed exclusively by *federal* law. For example, the ESP rulings hold that Transcom is *not* a carrier, is *not* an interexchange carrier ("IXC"), and its traffic is *not* subject to access charges. These

⁵ The FCC has directly held on several occasions that even the possibility of state regulation and inconsistent burdens and obligations constitutes a barrier to entry and must be avoided. *See, e.g.*, Declaratory Ruling, *In the Matter of Public Service Company of Oklahoma Request for Declaratory Ruling*, DA 88-544, ¶ 24, 3 FCC Rcd 2327, 2329 (rel. Apr. 1988) (**finding that "inconsistent state regulation" "would impede development of a uniform system of regulation for Commission licensees."**); Second Report and Order, *In the Matter of Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services; In the Matter of the Applications of Global Land Mobile Satellite, Inc.; Globesat Express; Hughes Communications Mobile Satellite, Inc.; MCCA American Satellite Service Corporation; McCaw Space Technologies, Inc.; Mobile Satellite Corporation; Mobile Satellite Service, Inc.; North American Mobile Satellite, Inc.; Omnicom Corporation; Satellite Mobile Telephone Co.; Sky-Link Corporation; Wismer & Becker/Transmit Communications, Inc.*, FCC 86-552, ¶ 40, 2 FCC Rcd 485, 491 (rel. Jan. 1987)(**finding that "permitting states to impose their individual regulatory schemes over" an FCC licensee "would not only be impractical but would seriously jeopardize the operation of the system. Requiring the consortium to adhere to fifty potentially conflicting" standards "would render implementation" "virtually impossible."**)

rulings hold, instead, that Transcom is an ESP and therefore an “end user” and is entitled to obtain “telephone exchange service” as an end user rather than “exchange access” as an IXC.

10. CMRS carriers – like Halo here – predominately provide “telephone exchange service” to end users.⁶ States are pre-empted from imposing rate or entry regulation on CMRS. *See* 47 U.S.C. § 332(c)(3). Nor can states or local governmental authorities take action that will “prohibit or have the effect of prohibiting the provision of personal wireless services.”⁷ 47 U.S.C. § 332(c)(7)(B)(i)(II). The FCC has *exclusive* jurisdiction over wireless licensing, market entry by private and commercial wireless service providers and the rates charged for wireless services.

11. The Supreme Court and several courts of appeals have consistently held that state commissions cannot undertake to interpret or enforce federal licenses because “a multitude of interpretations of the same certificate” will result.⁸ *See Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 178-79 (1959). The FCC is the exclusive “first decider” and must be the one to interpret, in the first instance, whether a particular activity falls within the certificates it has issued. *Id.* at 177; *see also Gray Lines Tour, Co. v. Interstate Commerce Com.*, 824 F.2d 811, 815 (9th Cir. 1987) and *Middlewest Motor Freight Bureau v. ICC*, 867 F.2d 458, 459 (8th Cir. 1989). If a state commission or AT&T believe that the federally-licensed entity is engaging

⁶ See First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, ¶¶ 1004, 1006, 1008, 11 FCC Rcd 15499, 16045 (1996) (“Local Competition Order”) (subsequent history omitted) (finding that CMRS predominately provides “telephone exchange service”).

⁷ “Personal Wireless Service” is defined in § 332(c)(7)(C)(i) and includes CMRS.

⁸ “It appears clear that interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action. * * * Thus the possibility of a multitude of interpretations of the same federal certificate by several States will be avoided and a uniform administration of the Act achieved.” *Service Storage & Transfer Co. v. Com. of Va.*, 359 U.S. 171, 177 (1959).

in some “scheme” or “subterfuge” through its practices, the proper forum is the FCC. Similarly, if any state commission has a concern, its remedy is to petition the federal licensing body for relief. *Service Storage*, 359 U.S. at 179. A state commission cannot take any action that would “amount to a suspension or revocation” of a federal license. *Castle, Attorney General v. Hayes Freight Lines*, 348 U.S. 61, 64 (1954).⁹

II. The Commission should dismiss Count I of the Complaint because the traffic being sent to AT&T does originate from end user wireless equipment.

12. The ICA has a recital (cited by AT&T in ¶ 9 of the Complaint) that provides:

Whereas, the Parties have agreed that this Agreement will apply only to (1) traffic that originates on AT&T’s network or is transited through AT&T’s network and is routed to Carrier’s wireless network for wireless termination by Carrier; and (2) traffic that originates through wireless transmitting and receiving facilities before Carrier delivers traffic to AT&T for termination by AT&T or for transit to another network.

13. Contrary to AT&T’s assertion in paragraph 10 of the Complaint, the traffic in issue *does* originate “through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T.” Complaint, ¶ 10. The network arrangement in every state and every MTA is the same. Halo has established a 3650 MHz base station in each MTA. Halo’s customer has 3650 MHz wireless stations – which constitute CPE as defined in the Act – that are sufficiently proximate to the base station to establish a wireless link with the base station. When the customer wants to initiate a session, the customer originates a call using the wireless station that is handled by the base station, processed through Halo’s network, and ultimately handed off to AT&T for termination or transit over the interconnection arrangements that are in place as a result of the various ICAs.

⁹ “Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier’s commission-granted right to operate. ... It cannot be doubted that suspension of this common carrier’s right to use Illinois highways is the equivalent of a partial suspension of its federally granted certificate.”

14. AT&T is apparently claiming that Halo is merely “re-originating” traffic and that the “true” end points are elsewhere on the PSTN. In making this argument, however, AT&T is advancing the exact position that the D.C. Circuit rejected in *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). In that case, the D.C. Circuit held it did not matter that a call received by an ISP is instantaneously followed by the origination of a “further communication” that will then “continue to the ultimate destination” elsewhere. The Court held that “the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not ‘terminate’ at the ISP.” In other words, the D.C. Circuit clearly recognizes – and functionally held – that an ESP is an “origination” and “termination” endpoint for intercarrier compensation purposes (as opposed to *jurisdictional* purposes, which does use the “end-to-end” test).

15. The traffic here goes to Transcom where there is a “termination.” Transcom then “originates” a “further communication” in the MTA. In the same way that ISP-bound traffic *from* the PSTN is immune from access charges (because it is not “carved out by section 251(g) and is covered by section 251(b)(5)), the call *to* the PSTN is also immune.¹⁰ Enhanced services were defined long before there was a public Internet. ESPs do far more than just hook up “modems” and receive calls. They provide a wide set of services and many of them involve calls to the PSTN.¹¹ The FCC observed in the first decision that created what is now known as the

¹⁰ The ILECs incessantly assert that the ESP Exemption only applies “only” for calls “from” an ESP customer “to” the ESP. This is flatly untrue. ESPs “may use incumbent LEC facilities to originate and terminate interstate calls[.]” See NPRM, *In the Matter of Access Charge Reform*, 11 FCC Rcd 21354, 21478 (FCC 1996). The FCC itself has consistently recognized that ESPs – as end users – “originate” traffic even when they received the call from some other end-point. That is the purpose of the FCC’s finding that ESPs systems operate much like traditional “leaky PBXs.”

¹¹ See, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and HALO WIRELESS, INC.’S PARTIAL MOTION TO DISMISS; NOTICE OF MAY 16, 2006 ORDER CONFIRMING PLAN OF REORGANIZATION OF TRANSCOM ENHANCED SERVICES AND MOTION TO DISMISS; AND ANSWER TO THE COMPLAINT OF BELL SOUTH TELECOMMUNICATIONS, LLC D/B/A AT&T SOUTH CAROLINA*

“ESP Exemption” that ESP use of the PSTN resembles that of the “leaky PBXs” that existed then and continue to exist today, albeit using much different technology. Even though the call started somewhere else, as a matter of law a Leaky PBX is still deemed to “originate” the call that then terminates on the PSTN.¹² As noted, the FCC has expressly recognized the bidirectional nature of ESP traffic, when it observed that ESPs “may use incumbent LEC facilities to originate and terminate interstate calls.” Halo’s and Transcom’s position is simply the direct product of Congress’ choice to codify the ESP Exemption, and neither the FCC nor state commissions may overrule the statute.

16. In other proceedings, the ILECs have pointed to certain language in paragraph 1066 of the FCC’s recent rulemaking that was directed at Halo, and the FCC’s discussion of “re-origination.” That language, however, necessarily assumes that Halo is serving a carrier, not an ESP. TDS told the FCC that Transcom was a carrier, and the FCC obviously assumed – while expressly not ruling – that the situation was as TDS asserted. This is clear from the FCC’s characterization in the same paragraph of Halo’s activities as a form of “transit.” “Transit” occurs when one carrier switches traffic *between two other carriers*. Indeed, that is precisely the

Pricing Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket Nos. 96-262, 96-263, 94-1, 91-213, FCC 96-488, 11 FCC Rcd 21354, 21478, ¶ 284, n. 378 (rel. Dec. 24, 1996); Order, *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, FCC 88-151, 3 FCC Rcd 2631, 2632-2633. ¶13 (rel. April 27 1988); Memorandum Opinion and Order, *MTS and WATS Market Structure*, Docket No. 78-72, FCC 83-356, ¶¶ 78, 83, 97 FCC 2d 682, 711-22 (rel. Aug. 22, 1983).

¹² See, Memorandum Opinion and Order, *MTS and WATS Market Structure*, Docket No. 78-72, FCC 83-356, ¶¶ 78, 83, 97 FCC 2d 682, 711-22 (rel. Aug. 22, 1983) [discussing “leaky PBX and ESP resemblance”]; Second Supplemental NOI and PRM, *In the Matter of MTS and WATS Market Structure*, FCC 80-198, CC Docket No. 78-72, ¶ 63, 77 F.C.C.2d 224; 1980 FCC LEXIS 181 (rel. Apr. 1980) [discussing “leaky PBX”].

definition the FCC provided in paragraph 1311 of the recent rulemaking.¹³ Halo simply cannot be said to be providing “transit” when it has an end user as the customer on one side and a carrier on the other side. Any other construction necessarily leads to the conclusion that the FCC has decided that the D.C. Circuit was wrong in *Bell Atlantic*.

17. Halo agrees that a call handed off from a Halo carrier customer would not be deemed to originate on Halo’s network.¹⁴ But Transcom is not a carrier, it is an ESP. ESPs always have “originated further communications,” but for compensation purposes (as opposed to jurisdictional purposes), the ESP is still an end-point and a call originator. Again, once one looks at this from an end user customer perspective, the call classification result is obvious. The FCC and judicial case law is clear that an end user PBX “originates” a call even if the communication initially came in to the PBX from another location on the PSTN and then goes back out and terminates on the PSTN.¹⁵

¹³ “1311. Transit. Currently, transiting occurs when two carriers that are not directly interconnected exchange non-access traffic by routing the traffic through an intermediary carrier’s network. Thus, although transit is the functional equivalent of tandem switching and transport, today transit refers to non-access traffic, whereas tandem switching and transport apply to access traffic. As all traffic is unified under section 251(b)(5), the tandem switching and transport components of switched access charges will come to resemble transit services in the reciprocal compensation context where the terminating carrier does not own the tandem switch. In the Order, we adopt a bill-and-keep methodology for tandem switched transport in the access context and for transport in the reciprocal compensation context. The Commission has not addressed whether transit services must be provided pursuant to section 251 of the Act; however, some state commissions and courts have addressed this issue.” (emphasis added)

¹⁴ See § 252(d)(2)(A)(i), which imposes the “additional cost” mandate on “calls that originate on the network facilities of the other carrier.”

¹⁵ See, e.g., *Chartways Technologies, Inc. v. AT&T*, 8 FCC Rcd 5601, 5604 (1993); *Directel Inc. v. American Tel. & Tel. Co.*, 11 F.C.C.R. 7554 (June 26, 1996); *Gerri Murphy Realty, Inc. v. AT&T*, 16 FCC Rcd 19134 (2001); *AT&T v. Intrend Ropes and Twines, Inc.*, 944 F.Supp. 701, 710 (C.D. Ill. 1996); *American Tel. & Tel. Co. v. Jiffy Lube Int’l, Inc.*, 813 F. Supp. 1164, 1165-1170 (D. Maryland 1993); *AT&T v. New York Human Resources Administration*, 833 F. Supp. 962 (S.D.N.Y. 1993); *AT&T v. Community Health Group*, 931 F. Supp. 719, 723 (S.D. Cal. 1995); *AT&T Corp. v. Fleming & Berkley*, 1997 U.S. App. LEXIS 33674 *6-*16 (9th Cir. Cal. Nov. 25, 1997).

18. So, Halo has an end-user customer—Transcom. Although this end user customer receives calls from other places, for intercarrier compensation purposes, the calls still originate on Halo’s network. That customer connects wirelessly to Halo. Transcom “originates” communications “wirelessly” to Halo, and all such calls are terminated within the same MTA where Transcom originated them (the system is set up to make sure that all calls are “intraMTA”). This arrangement matches up exactly with the requirement in the recital that AT&T relies on.

19. AT&T is barred from asserting that Halo’s customer is not an end user. Halo’s “High Volume” customer whose traffic is at issue is Transcom. Transcom and AT&T were directly involved in litigation, and the court twice held – over AT&T’s strong opposition – that Transcom is an ESP and end user, is not a carrier, and access charges do not apply to Transcom’s traffic. This specific set of rulings was incorporated into the Confirmation Order in Transcom’s bankruptcy case. AT&T was a party and is bound by these holdings. AT&T is barred from raising any claim that Transcom is anything other than an ESP and end user qualified to purchase telephone exchange service from carriers, and cannot now collaterally attack the bankruptcy court rulings. Transcom’s status as an end user is not subject to debate.

20. Once it is clear that Transcom is Halo’s telephone exchange service end user customer, then all of AT&T’s contentions simply fail. End users originate calls. The calls at issue are “end user” calls, so AT&T’s assertions are flatly incorrect and the claim is based on the impermissible and incorrect premise that Halo’s customers are not “end users” purchasing telephone exchange service in the MTA.

III. The Commission should dismiss Count II of the Complaint because Halo is not altering or deleting call detail, and therefore, Halo is not in breach of the ICA.

21. AT&T's contentions in Count II also fail once it is understood that this is end user telephone exchange service originating traffic, and the service being provided is functionally equivalent to an integrated services digital network ("ISDN") primary rate interface ("PRI") (hereinafter referred to as "ISDN PRI") trunk to a large communications intensive business customer. Indeed, Halo's signaling practices with regard to CN were exactly the same as those AT&T uses when it provides ISDN PRI trunk service to a business customer.

22. To the extent any E.164 address is properly used for rating or jurisdictionalizing (which we deny), CN address signal content, rather than that for CPN, is the information that should have been used. The reason is that the presentation of this address signal content correctly advertises that the call is originating from a Halo end user customer, and the particular billing number used demonstrates that the call originated in the same MTA as the terminating location.

23. For this reason, Halo's practices did not in any way prevent AT&T from accurately measuring, rating, or billing this reciprocal compensation traffic; to the contrary, it *ensured* that AT&T's systems recognize the end user telephone exchange traffic that it is. The ICA in issue does not rate traffic based on telephone numbers, but if and to the extent AT&T's systems nonetheless (and in violation of the ICA) use the calling and called numbers to rate, bill, or validate, Halo's practice resulted in proper rating and billing.

24. The ICA contemplated that Halo would populate the CN parameter exactly the way that Halo does so. General Terms and Conditions § XIV.E is very clear:

E. The parties will provide Common Channel Signaling (CCS) information to one another, where available and technically feasible, in conjunction with all traffic in order to enable full interoperability of CLASS features and functions

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except for call return. All CCS signaling parameters will be provided, including automatic number identification (ANI), originating line information (OLI) calling party category, charge number, etc. All privacy indicators will be honored, and the parties agree to cooperate on the exchange of Transactional Capabilities Application Part (TCAP) messages to facilitate full interoperability of CCS-based features between the respective networks. (emphasis added)

25. Halo performed the “Class 5” functions and populated the CPN and CN parameters with the address signal information that should appear in each location. Halo’s practices with regard to the CN were exactly the same as AT&T’s when it serves a business end user with an ISDN PBX.

26. Halo does not change the content or in any way “manipulate” the address signal information that is ultimately populated in the SS7 ISUP IAM CPN parameter. Halo populated the CN parameter with the Billing Telephone Number of its end user customer, Transcom. AT&T alleges improper modification of signaling information related to the CN parameter, but the basis of this claim once again results from the assertion that Transcom is a carrier rather than an end user and runs counter to the ESP Rulings discussed above.

27. Halo’s network is IP-based, and the network communicates internally and with customers using a combination of WiMAX and SIP. To interoperate with the SS7 world, Halo must conduct a protocol conversion from IP to SS7 and then transmit call control information using SS7 methods. AT&T’s allegations fail to appreciate this fact, and are otherwise technically incoherent. They reflect a distinct misunderstanding of technology, SS7, the current market, and most important, a purposeful refusal to consider this issue through the lens of CMRS telephone exchange service provided to an end user.

28. From a technical perspective, “industry standard” in the United States for SS7 ISUP is American National Standards Institute (“ANSI”) T1.113, which sets out the semantics

and syntax for SS7-based CPN and CN parameters. The “global” standard is contained in ITU-T series Q.760-Q.769. ANSI T1.113 describes the CPN and CN parameters:

Calling Party Number. Information sent in the forward direction to identify the calling party and consisting of the odd/even indicator, nature of address indicator, numbering plan indicator, address presentation restriction indicator, screening indicator, and address signals.

Charge Number. Information sent in either direction indicating the chargeable number for the call and consisting of the odd/even indicator, nature of address indicator, numbering plan indicator, and address signals.

29. The various indicators and the address signals have one or more character positions within the parameter and the standards prescribe specific syntax and semantics guidelines. The situation is essentially the same for both parameters, although CN can be passed in either direction, whereas CPN is passed only in the forward direction. The CPN and CN parameters were created to serve discrete purposes and they convey different meanings consistent with the design purpose. For example, CPN was created largely to make “Caller ID” and other CLASS-based services work. Automatic Number Identification (“ANI”) and CN, on the other hand, are pertinent to billing and routing. Halo’s signaling practices on the SS7 network complied with the ANSI standard with regard to the address signal content.

30. Halo’s practices were also consistent with the Internet Engineering Task Force (“IETF”) standards for Session Initiated Protocol (“SIP”) and SIP to Integrated Services Digital Network (“ISDN”) User Part (“ISUP”) mapping. Halo populated the SS7 ISUP IAM CPN parameter with the address signal information that Halo has received from its High Volume customer, Transcom. Specifically, Halo’s practices were consistent with the IETF Request for Comments (“RFCs”) relating to mapping of SIP headers to ISUP parameters. *See, e.g., G. Camarillo, A. B. Roach, J. Peterson, L. Ong, RFC 3398, Integrated Services Digital Network*

(ISDN) User Part (ISUP) to Session Initiation Protocol (SIP) Mapping, © The Internet Society (2002), available at <http://tools.ietf.org/html/rfc3398>.

When a SIP INVITE arrives at a PSTN gateway, the gateway SHOULD attempt to make use of encapsulated ISUP (see [3]), if any, within the INVITE to assist in the formulation of outbound PSTN signaling, but SHOULD also heed the security considerations in Section 15. If possible, the gateway SHOULD reuse the values of each of the ISUP parameters of the encapsulated IAM as it formulates an IAM that it will send across its PSTN interface. In some cases, the gateway will be unable to make use of that ISUP - for example, if the gateway cannot understand the ISUP variant and must therefore ignore the encapsulated body. Even when there is comprehensible encapsulated ISUP, the relevant values of SIP header fields MUST 'overwrite' through the process of translation the parameter values that would have been set based on encapsulated ISUP. In other words, the updates to the critical session context parameters that are created in the SIP network take precedence, in ISUP-SIP-ISUP bridging cases, over the encapsulated ISUP. This allows many basic services, including various sorts of call forwarding and redirection, to be implemented in the SIP network.

For example, if an INVITE arrives at a gateway with an encapsulated IAM with a CPN field indicating the telephone number +12025332699, but the Request-URI of the INVITE indicates 'tel:+15105550110', the gateway MUST use the telephone number in the Request-URI, rather than the one in the encapsulated IAM, when creating the IAM that the gateway will send to the PSTN. Further details of how SIP header fields are translated into ISUP parameters follow.

31. Halo's high volume customer will sometimes pass information that belongs in the CPN parameter that does not correctly convey that the Halo end user customer is originating a call in the MTA. When this is the case, Halo still populates the CPN, including the address signal field with the original information supplied by the end user customer. Halo, however, also populated the CN parameter. The number appearing in the CN address signal field was usually one assigned to Halo's customer and is the Billing Account Number, or its equivalent, for the service provided in the MTA where the call is processed. In ANSI terms, that is the "chargeable number." This practice was also consistent with the developing IETF consensus and practices

and capabilities that have been independently implemented by many equipment vendors in advance of actual IETF “standards.”

32. SIP “standards” do not actually contain a formal header for “Charge Number.” Vendors and providers began to include an “unregistered” “private” header around 2005. The IETF has been working on a “registered” header for this information since 2008. *See* D. York and T. Asveren, SIPPING Internet-Draft, *P-Charge-Info - A Private Header (P-Header) Extension to the Session Initiation Protocol (SIP)* (draft-york-sipping-p-charge-info-01) © The IETF Trust (2008), available at <http://tools.ietf.org/html/draft-york-sipping-p-charge-info-01> (describing “‘P-Charge-Info’, a private SIP header (P-header) used by a number of equipment vendors and carriers to convey simple billing information.”). The most recent draft was released in September, 2011. *See* D. York, T. Asveren, SIPPING Internet-Draft, *P-Charge-Info - A Private Header (P-Header) Extension to the Session Initiation Protocol (SIP)* (draft-york-sipping-p-charge-info-12), © 2011 IETF Trust, available at <http://www.ietf.org/id/draft-york-sipping-p-charge-info-12.txt>. Halo’s practices related to populating the Halo-supplied Billing Telephone Number (“BTN”) for Transcom in the SS7 ISUP IAM CN parameter were quite consistent with the purposes for and results intended by each of the “Use Cases” described in the most recent document.

33. Halo notes that, with regard to its consumer product, Halo will signal the Halo number that has been assigned to the end user customer’s wireless CPE in the CPN parameter. There is no need to populate the CN parameter, unless and to the extent the Halo end user has turned on call forwarding functionality. In that situation, the Halo end user’s number will appear in the CN parameter and the E.164 address of the party that called the Halo customer and whose call has been forwarded to a different end-point will appear in the CPN parameter. Once again,

this is perfectly consistent with both ANSI and IETF practices for SIP and SS7 call control signaling and mapping.

34. Halo was exactly following industry practice applicable to an exchange carrier providing telephone exchange service to an end user, and in particular a communications-intensive business end user with sophisticated CPE.

IV. Count III expressly disclaims that the traffic is subject to the ICA, and thus, the Commission lacks jurisdiction over Count III. Further, the Bankruptcy Stay prohibits consideration of any order to pay access charges.

35. AT&T incorrectly asserts that Halo's traffic is not reciprocal compensation traffic, but is instead subject to exchange access. Paragraph 17 of the Complaint asserts that the traffic in issue is not covered by the ICA at all. AT&T then asks that Halo be required to pay AT&T significant sums for access on both an historical and prospective basis.

36. AT&T indicates in note 12 that it proposes to defer Counts III and IV until after Counts I and II are disposed. Halo has moved to dismiss Counts I and II.¹⁶ Since AT&T itself asserts that the entirety of the traffic is not covered by the ICA, Count III cannot be said to be part of a post-ICA dispute; instead, it is on its face a tariff collection action over which the Commission lacks jurisdiction because it is as a matter of law a claim for damages.

37. Regardless, the Bankruptcy Court's order does not allow the Commission to "order" payment of any sums. It provides, in pertinent part:

... any regulatory proceedings in respect of the matters described in the AT&T Motion, including the State Commission Proceedings, may be advanced to a conclusion and a decision in respect of such regulatory matters may be rendered; *provided however*, that nothing herein shall permit, as part of such proceedings:

A. liquidation of the amount of any claim against the Debtor; or

¹⁶ The only Count over which the Commission does have jurisdiction is Count IV. Halo stands ready to try those issues.

B. any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor (collectively, the “Reserved Matters”)

38. Therefore, the Commission cannot order payment of any access charges or address the amount of any access charges that might wrongly be held to apply.

39. Without waiver of and subject to the foregoing, Halo does not owe access charges to AT&T for several reasons.

40. First, as noted above, this is end user telephone exchange service originated intraMTA traffic, and as such is subject to section 251(b)(5) reciprocal compensation. It is not telephone toll traffic, is not “transit,” and is not interMTA.

41. Second, and equally important, the ICA does not rate traffic as between reciprocal compensation and interMTA on a call-by-call basis. Instead, there is a negotiated factor that must be used. Section IV.F provides:

The parties will use an auditable PLU factor as a method for determining the amount of traffic exchanged by the parties that is Local or Non-Local. The PLU factor will be used for traffic delivered by either party for termination on the other party’s network.

42. Similarly section VI.C.3 states:

The Parties will use an auditable PLU factor as a method for determining whether traffic is Local or Non-Local. The PLU factor will be used for traffic delivered by either party for termination on the other party’s network. The amount that each party shall pay to the other for the delivery of Local Traffic shall be calculated by multiplying the applicable rate in Attachment B-1 for each type of call by the total minutes of use each month for each such type of call. The minutes of use or portion thereof for each call, as the case may be, will be accumulated for the monthly billing period and the total of such minutes of use for the entire month rounded to the nearest minute. The usage charges will be based on the rounded total monthly minutes.

43. This negotiated factor cannot be unilaterally changed. Instead, it must be mutually acceptable. If the parties cannot reach agreement, then the dispute resolution

provisions in the ICA must be used. Any change to the factor is prospective only. AT&T has not proposed any change to the current negotiated factor. Halo has not agreed to any change. AT&T cannot unilaterally re-rate traffic – either historically or prospectively – absent a negotiated change or a mandated change after dispute resolution. Again, however, any mandated change would be prospective only.

44. Halo contests AT&T's attempt to unilaterally change the factors used to attribute traffic between intraMTA and interMTA. Factor changes cannot be dictated by AT&T, and use data or information AT&T collects and employs however it wants without ever disclosing the data or information to Halo. AT&T's "demand" to Halo, mentioned in paragraph 17 of the Complaint, did not request a change to the negotiated factor, did not ask Halo to agree to a change, and was inadequate to raise the issue of whether the factors should be changed and what any new factor should be within any informal or formal dispute resolution. AT&T's Complaint does not seek an order compelling a change to the factor. Therefore, regardless of whether any particular call somehow be deemed subject to the exchange access regime rather than section 251(b)(5), no relief can be granted because the ICA has a negotiated factor that already allocates minutes between those two regimes, and AT&T has not done what is necessary to obtain a change to that factor.

V. Conclusion.

45. AT&T's repeated, conclusory allegations that Halo is engaged in some kind of "scheme" are unfounded. All of these allegations are premised on the impermissible claim that Halo's customer is not an end user purchasing telephone exchange service. Halo is not an "aggregator" or what AT&T has in the past derisively called a "least-cost router." Halo has no

IXC customers that consume the equivalent of Halo's exchange access service¹⁷; each customer is an end user.

46. Halo is a CMRS provider and is providing CMRS service to its end user customers in the form of telephone exchange service. Halo does not provide any "telephone toll service" where the traffic is going over the interconnection arrangements with AT&T. Halo's end user customers can use the service as they see fit to transmit messages and information, and Halo – as a common carrier – does not and cannot inquire into its nature or content so long as the end user complies with Halo's terms of service. Halo's network was designed to obtain the result that only traffic handled by a base station communicating with a end user customer's wireless station in the MTA where the call is terminated will be routed to AT&T in that MTA. Once the end user/telephone exchange service nature of the traffic at issue is recognized, the "scheme" assertions – like all of AT&T's other spurious claims – simply vanish.

47. For the foregoing reasons, Counts I, II, and III of the Complaint should be dismissed.

**HALO WIRELESS, INC.'S NOTICE OF MAY 16, 2006 ORDER CONFIRMING PLAN
OF REORGANIZATION OF TRANSCOM ENHANCED SERVICES
AND MOTION TO DISMISS COMPLAINT WITH PREJUDICE**

48. Subject to the Motion to Dismiss urged in paragraphs 1 through 47 above, and without waiver of the same, Halo files this Notice of May 16, 2006 Order Confirming Plan of Reorganization of Transcom Enhanced Services, LLC n/k/a Transcom Enhanced Services, Inc. and Motion to Dismiss Complaint with Prejudice and, for such, would respectfully show unto the Commission as follows:

¹⁷ Halo can serve IXCs, and very likely will. When that happens, Halo will be providing exchange access as defined in the Act, and the associated traffic handled by both AT&T and Halo will be "jointly provided access," which means each of Halo and AT&T will be responsible for separately billing the IXC for the part of the access that each provides. Halo will not be responsible for paying AT&T's access entitlement.

I. Transcom's Chapter 11 Proceeding and Confirmation Order.

49. Transcom Enhanced Services, LLC n/k/a Transcom Enhanced Services, Inc. ("Transcom") was formed in or around May of 2003 for the purpose of purchasing the assets of DataVon, Inc. Since then, Transcom has continued to provide enhanced information services, including toll quality voice and data communications utilizing converged, Internet Protocol ("IP") services over privately managed private IP networks. Transcom's information services include voice processing and arranged termination utilizing voice over IP technology.

50. In July 2003, Transcom entered into a MTA Agreement MA Reference No. 120783 dated July 11, 2003 (the "AT&T Master Agreement"). At or around the same time, Transcom also entered into a MSA Agreement with BellSouth Telecommunications, Inc. n/k/a BellSouth Telecommunications, LLC ("AT&T") (the "MSA Agreement").

51. On February 18, 2005 (the "Petition Date"), Transcom filed a voluntary petition for relief under chapter 11 of title 11 U.S. Code (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Transcom Bankruptcy Court") under Bankruptcy Case No. 05-31929-HDH-11 (the "Transcom Bankruptcy Case").

52. AT&T, AT&T Corporation, Southwestern Bell Telephone, L.P., Illinois Bell Telephone, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, Ohio Bell Telephone Company, Wisconsin Bell, Inc., Pacific Bell Telephone Company, Nevada Bell Telephone Company, The Southern New England Telephone Company, and The Woodbury Telephone Company, were all creditors and parties in interest in the Transcom Bankruptcy Case (collectively, the "AT&T/SBC Creditors").

53. On March 31, 2006, Transcom and First Capital Group of Texas III, L.P. (collectively, the “Proponents”), filed their Original Joint Plan of Reorganization and Disclosure Statement for Plan (hereafter, the “Plan” and “Disclosure Statement”). On April 3, 2006, the Proponents filed their Joint Motion for Conditional Approval of Disclosure Statement, and on April 12, 2006, the Transcom Bankruptcy Court conditionally approved the Disclosure Statement.

54. On April 12, 2006, the Disclosure Statement, Plan, Ballot (for accepting or rejecting the Plan), Notice of May 16, 2006 Confirmation Hearing, and related materials was served upon all creditors, including AT&T.

55. Throughout the Bankruptcy Case, the primary issue litigated with the AT&T/SBC Creditors was whether Transcom provided Enhanced Services, as defined by the FCC, and was therefore exempt from the payment of access charges. Shortly after the Petition Date, on March 11, 2005, Transcom filed its Motion to Assume the AT&T Master Agreement. An evidentiary hearing was held on April 14, 2005, and after taking the matter under advisement, the Transcom Bankruptcy Court, on April 28, 2005, issued a Memorandum Opinion and order which granted Transcom’s Motion to Assume. In the Memorandum Opinion, the Bankruptcy Court specifically found and concluded that “[Transcom]’s service is an enhanced service, not subject to payment of access charges.” Memorandum Opinion, p. 12. The Bankruptcy Court also established a Bankruptcy Code Section 365 cure amount of \$103,262.55. *Id.* Some of the AT&T/SBC Creditors appealed the April 28, 2005 Order to the United States District Court for the Northern District of Texas, Dallas Division (Case No. 3:05-CV-1209-B) (the “District Court”). However, because Transcom did not pay the cure amount while the appeal was pending, the District Court

on February 9, 2006, dismissed the appeal as moot and vacated the April 28, 2005 Order and Memorandum Opinion.

56. Notwithstanding the dismissal of the April 28, 2005 Order and Memorandum Opinion, Transcom maintained throughout its Bankruptcy Case that it continued to provide Enhanced Services. In the Disclosure Statement, Transcom stated that it

has continued to provide enhanced information services, including toll-quality voice and data communications utilizing, Internet Protocol (IP) services over privately managed private IP networks. ... By providing unique, customized call solutions over its VoIP network, [Transcom] believes that it meets the FCC's definition of Enhanced Services, eliminating the need to pay standard voice call tolls.

Disclosure Statement, Sec. 5 p. 7 (citations omitted). Both the Plan and Disclosure Statement further provide that Transcom

continues to use and benefit from its contracts pursuant to which it sells its enhanced services (the "Customer Contracts"). Assumption of the Customer Contracts is in the best interest of the [Transcom] estate. Accordingly, pursuant to Bankruptcy Code Section 365, the Confirmation Order will authorize [Transcom] to assume all of its Customer Contracts. No cure payments are owed or required with respect to the Customer Contracts.

Disclosure Statement, Sec. 9 p. 14; Plan, Sec. 10.01-.02, p. 23. Plan Exhibit 1-B also identifies the MSA Agreement between Transcom and AT&T.

57. All of the AT&T/SBC Creditors, including AT&T, received the Plan and Disclosure Statement approximately one month prior to the May 16, 2006 Confirmation Hearing. Despite receiving adequate notice, AT&T neither objected to confirmation of Transcom's Plan nor the proposed assumption of the MSA Agreement with AT&T.

58. On May 16, 2006, and after considering the evidence and arguments of counsel, the Bankruptcy Court entered its Order Confirming the Plan (the “Confirmation Order”). In relevant part, paragraph 4 of the Transcom Confirmation Order provides

In contested hearings held on or about April 14, 2005, [Transcom] established that its business activities meet the definitions of “enhanced service” (47 C.F.R. § 67.702(a)) and “information service” (47 U.S.C. § 153(20)), and that the services it provides fall outside of the definitions of “telecommunications” and “telecommunications service” (47 U.S.C. § 153(43) and (46), respectively), and therefore, as this Court has previously determined, **[Transcom]’s services are not subject to access charges, but rather qualify as information services and enhanced services that must pay end user charges.**

(Emphasis added). Pursuant to Bankruptcy Code Section 365(a), the Confirmation Order also assumes Transcom’s Customer Contracts and Vendor Agreements. Confirmation Order, p. 9.

59. On May 18, 2006, Transcom served the Confirmation Order on all creditors, including AT&T and the AT&T/SBC Creditors. A Certificate of Service was filed with the Bankruptcy Court on May 18, 2006. No creditor or party sought to appeal the Transcom Confirmation Order, and the Order is now final and non-appealable.

60. As set forth below, the Bankruptcy Court’s determination that Transcom provides Enhances Services not subject to access charges, and that Transcom is an end user, is binding on all creditors of Transcom, including AT&T. Because Counts I, II and III of AT&T’s Complaint against Halo necessitates a finding that Transcom does *not* provide Enhanced Services, the Commission should dismiss, with prejudice, those three counts of the Complaint.

II. Exhibits.

61. The following Exhibits are attached hereto as referenced below and are incorporated herein for all purposes:

Tab A	Bankruptcy Court's April 28, 2005 Memorandum Opinion
Tab B	Transcom's March 31, 2006 Disclosure Statement for (including) Joint Plan of Reorganization
Tab C	April 12, 2006 Certificate of Service of Order (1) Conditionally Approving Disclosure Statement, (2) Setting Date for Confirmation Hearing, (3) Fixing Deadlines for Voting on and Objection to the Plan, and (4) Approving Form of Solicitation Package
Tab D	Bankruptcy Court's May 16, 2006 Order Confirming Plan
Tab E	May 18, 2006 Certificate of Service of Order Confirming Plan
Tab F	District Court's January 20, 2006 Memorandum Order and February 9, 2006 Judgment which vacated Bankruptcy Court's Memorandum Opinion
Tab G	Affidavit of Robert Johnson

III. Effect of Confirmation of Transcom's Plan.

62. The Confirmation Order binds Transcom and all of its creditors, including AT&T.

In relevant part, Bankruptcy Code Section Section 1141(a) provides

[T]he provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, and entity acquiring property under the plan, and any creditor, equity security holder, or general partner of the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

Because the Plan and Confirmation Order are binding, AT&T may not challenge Transcom's status as an Enhanced Service Provider.

63. Res Judicata. In addition to the clear mandate of Bankruptcy Code Section 1141(a), claim preclusion, or *res judicata* "bars the litigation of claims that either have been

litigated or should have been raised in an earlier suit.” *Petro-Hunt, L.L.C. v. U.S.*, 365 F.2d 385, 395 (5th Cir 2004).

64. “The doctrine of claim preclusion serves at least two important interests: protecting litigants against gamesmanship and the added litigation costs of claim-splitting, and preventing scarce judicial resources from being squandered in unnecessary litigation.” *Airframe Systems, Inc. v. Raytheon Co.*, 601 F.3d 9, 14 (1st Cir. 2010). As shown herein, those interests are especially implicated in this proceeding since AT&T had every opportunity to fully litigate Transcom’s status as an Enhanced Service provider by objecting to confirmation of the Plan yet made the strategic choice not to do so. Simply because AT&T was unhappy with the Bankruptcy Court forum, it “cannot obtain a second chance at a different outcome by bringing related claims against closely related defendants at a later date.” *Id.*

65. To establish a *res judicata* defense, a party must establish: “(1) the parties must be identical in both suits, (2) the prior judgment must have been rendered by a court of competent jurisdiction, (3) there must have a final judgment on the merits and (4) the same cause of action must be involved in both cases.” *Osherow v. Ernst & Young, LLP (In re Intellogic Trace, Inc.)*, 200 F.3d 382, 386 (5th Cir. 2000). This “four-part test has been applied in the bankruptcy context of an order confirming a plan of reorganization.” *Eubanks v. F.D.I.C.*, 977 F.2d 166, 170 (5th Cir. 1992) (citing *Howe v. Vaughan*, 913 F.2d 1138 (5th Cir. 1990), *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1053 (5th Cir. 1987)). *Res judicata* bars a cause of action adjudicated between the same parties or their privies in a prior case. *Id.* at 1057.

66. The first element, identity of the parties, is satisfied because AT&T was a creditor of Transcom throughout the Bankruptcy Case. It is also not necessary for Transcom to intervene in this proceeding for Halo to assert *res judicata* as a defense. Litigants which are in privity with

an earlier litigant, and/or litigants which hold such a ‘close and significant relationship’ with an earlier litigant (here, Transcom and Halo), sufficiently satisfy the ‘identical parties’ requirement. *Airframe Systems, Inc. v. Raytheon Co.*, 601 F.3d 9, 14 (1st Cir. 2010) (“Under our precedents, privity is a sufficient but not a necessary condition for a new defendant to invoke a claim preclusion defense. We, along with other circuits, have long held that claim preclusion applies if the new defendant is “closely related to a defendant from the original action—who was not named in the previous law suit,” not merely when the two defendants are in privity.”) (also collecting cases); see also *Hermes Automation Tech., Inc. v Hyundai Elec. Indus. Co., Ltd.*, 915 F.2d 739, 751 (1st Cir. 1990) (reaffirming the ‘close and significant relationship test’); *In re El San Juan Hotel Corp.*, 841 F.2d 6, 10-11 (1st Cir. 1988) (holding that the new defendant, an alleged co-perpetrator of the financial harms litigated in the first lawsuit, had a sufficiently close relationship to the original defendant as to invoke *res judicata* as a defense); *Gambocz v Velencsics*, 468 F.2d 837, 841-42 (3d Cir. 1972) (holding that unnamed co-conspirators sued in a subsequent suit could assert a *res judicata* defense when plaintiff had sued other conspirators on the same claims in the first suit). Accordingly, the first element of ‘identical parties’ is satisfied.

67. The second element is satisfied since the Bankruptcy Court had jurisdiction over the Plan and Confirmation Order pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (L), and 28 U.S.C. §§1334(b).

68. The third element is also established because the Confirmation Order is final, and confirmation by the Bankruptcy Court necessitated a finding of Plan feasibility, among other things, and that Transcom provides Enhanced Services.

69. Finally, the fourth element is established because the “critical issue under this determination is whether the two actions are based on the ‘same nucleus of operative facts.’” *In*

HALO WIRELESS, INC.’S PARTIAL MOTION TO DISMISS; NOTICE OF MAY 16, 2006 ORDER CONFIRMING PLAN OF REORGANIZATION OF TRANSCOM ENHANCED SERVICES AND MOTION TO DISMISS; AND ANSWER TO THE COMPLAINT OF BELL SOUTH TELECOMMUNICATIONS, LLC D/B/A AT&T SOUTH CAROLINA

re Intellogic, 200 F.3d at 386 (The bankruptcy court determined that an order approving a chapter 11 fee application had *res judicata* effect against the chapter 7 trustee's professional malpractice claim, and granted the defendant summary judgment. In affirming both the bankruptcy and district courts, the Fifth Circuit determined that the malpractice concerns should have been raised at the fee application hearing.).

70. Although the ICA between AT&T and Halo was signed after the Confirmation Order, the current action is undeniably based on the same nucleus of operative facts as the Bankruptcy Case because the primary issue in both proceedings is whether Transcom provides Enhanced Services.

71. As the Restatement of Judgments explains "When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar ..., the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Id.* at 386 (paraphrasing Restatement (Second) of Judgments, § 24 (1982)). As the Fifth Circuit further noted, Comment (c) of Section 24 explains:

Transaction may be single despite different harms, substantive theories, measures or kinds of relief.... That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.

Id. at 386 (citing Section 24, Comment c).

72. In entering its Confirmation Order, the Bankruptcy Court determined that Transcom

established that its business activities meet the definitions of “enhanced service” (47 C.F.R. § 67.702(a)) and “information service” (47 U.S.C. § 153(20)), and that the services it provides fall outside of the definitions of “telecommunications” and “telecommunications service” (47 U.S.C. § 153(43) and (46), respectively), and therefore, **as this Court has previously determined, [Transcom]’s services are not subject to access charges, but rather qualify as information services and enhanced services that must pay end user charges.**

Confirmation Order, para. 4 (emphasis added).

73. In sum, the Court made findings on not only similar shadings or different elements of facts, but the identical facts that are now the subject of AT&T’s Complaint against Halo. Since the Bankruptcy Court determined that Transcom provides Enhanced Services which are ‘not subject to access charges’, AT&T may not seek a contrary determination in this or any other proceeding.

74. This is also not a situation where AT&T was unaware of Transcom’s contentions that it provided Enhanced Services at the time that the Bankruptcy Case was pending – this contention was openly litigated during Transcom’s Bankruptcy Proceeding and was ultimately a critical component of Transcom’s emergence from bankruptcy. If AT&T desired to challenge Transcom’s status as an Enhanced Service provider, it “could or should have” objected to confirmation of Transcom’s Plan and the assumption of the MSA Agreement.

75. Collateral Estoppel. Even assuming that the ‘identical parties’ element of *res judicata* is absent, AT&T is nonetheless collaterally estopped from challenging Transcom’s status as an Enhanced Service provider. “Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party.” *United States v. Mendoza*, 464 U.S. 154, 159 n. 4 (1984).

76. Collateral estoppel precludes a party from litigating an issue already raised in an earlier action if:

- (1) the issue at stake is identical to the one involved in the earlier action;
- (2) the issue was actually litigated in the prior action; and
- (3) the determination of the issue in the prior action was a necessary part of the judgment in that action.

Petro-Hunt, L.L.C. v. U.S., 365 F.2d 385, 397 (5th Cir. 2004).

77. As set forth above, the Bankruptcy Court determined that “[Transcom]’s services are not subject to access charges, but rather qualify as information services and enhanced services that must pay end user charges.” Confirmation Order, para. 4. AT&T’s Complaint now confronts the Commission with the identical issue that the Bankruptcy Court was confronted with over five years ago. The issue was litigated on April 14, 2005, and again at the Confirmation Hearing. The Bankruptcy Court’s determination that Transcom is an Enhanced Service Provider was a necessary part of confirmation; if the Bankruptcy Court determined that Transcom did not provide Enhanced Services, the Plan would not be feasible and confirmation would have been denied.

78. Because AT&T’s Complaint raises claims and issues which were disposed of in the Plan and Confirmation Order – including a finding that Transcom provides Enhanced Services not subject to access charges – AT&T is barred under Bankruptcy Code Section 1141(a) and the doctrines of *res judicata* and collateral estoppel from seeking the payment of access charges from Halo.

**HALO WIRELESS, INC.'S ANSWER TO COUNT IV OF THE COMPLAINT OF
BELLSOUTH TELECOMMUNICATIONS, LLC D/B/A AT&T SOUTH CAROLINA**

79. Halo admits that the Commission has jurisdiction over the “facilities” issue.

80. Halo denies that it ordered the specific interconnection “transport facilities” from AT&T of which AT&T complains, and Halo further denies that AT&T has provided the specific interconnection “transport facilities” to Halo of which AT&T complains.

81. Halo admits that AT&T has incorrectly billed Halo for certain alleged “transport facilities.” Halo has properly disputed the incorrect billings.

82. Halo denies that AT&T is entitled to payment for the specific alleged “transport facilities” that are in issue. Halo denies that AT&T is entitled to the relief it requests in paragraph 18 of the Complaint.

83. By way of explanation, Halo further submits that the parties are interconnected in several of the former BellSouth states. Under the ICA, AT&T may only charge for interconnection “facilities” when AT&T-provided “facilities” are used by Halo to reach the mutually-agreed Point of Interconnection (“POI”). This is made clear by the usage in IV.A and then IV.B and C, which must be read in conjunction with VI.B.2 a and b.

84. The architecture in place is as follows: Halo obtains transmission from its network to AT&T tandem buildings from third party service providers. In the vast majority of locations, the third party service provider has transport facilities and equipment in the tandem building, either in a “meet me room” area or via collocation facilities purchased from AT&T. In a small handful of locations, for example Nashville, New Orleans, and Miami,¹⁸ Halo’s third party provider could not provide transport to the AT&T tandem Halo desired to use as the Type 2A

¹⁸ The Nashville, New Orleans, and Miami arrangements are not in issue in this matter.

interface location. In these rare instances, AT&T provisioned, and Halo is paying for, entrance facilities from AT&T to reach the tandem building. Those are facilities, but are not part of this dispute.

85. In all South Carolina markets, Halo has secured third party transport all the way up to the mutually-agreed POI. The third party transport provider will have a collocation arrangement in the AT&T South Carolina tandem. As part of its third party provided transport arrangements, Halo secures a Letter of Agency/Channel Facility Assignment (“LOA/CFA”) from its third party transport service provider. The CFA portion of the LOA/CFA document consists of an Access Customer Terminal Location (“ACTL”), the third party provider’s circuit ID, and a specific channel facility assignment (at the DS-3 or DS-1 level depending on the arrangements) on the third party’s existing transport facilities. This CFA defines the specific rack, panel and jack locations at Halo’s third party transport providers’ digital signal cross-connect (“DSX”) where Halo and AT&T meet to exchange traffic. In other words, the mutually-agreed POI between AT&T and Halo is located where AT&T “plugs in” its network on the DSX panel where the CFA is given to Halo by the third party transport provider. This is memorialized by the fact that each POI will have a POI Common Language Location Identifier (“CLLI”) code, and the CLLI code corresponds exactly to the CFA location.

86. The ACTL CLLI and the corresponding CFA CLLI, are each composed of four sub-fields: (1) four characters to denote the city (formally called the Geographical code); (2) two characters to denote the state or province (the Geopolitical code); (3) two characters to denote the specific location or building address (the Network-Site code); and (4) three characters to specify a particular piece of equipment (the Network Entity code). The Network Entity code clearly is not related to AT&T’s tandem switch; instead, it corresponds to the third party

transport provider's DSX. The POI is where Halo's network ends. Halo has expended considerable sums to get to the POI location, which is in the AT&T tandem. AT&T is cost-responsible from there.

87. In order to implement interconnection, AT&T has to install *cross-connects* that go to the POI at the third party transport providers DSX that is inside the tandem building so that the parties can exchange traffic. AT&T has wrongly chosen to call these cross-connects "channel terminations" and is attempting to bill Halo out of the access tariff for these cross-connects even though they are on AT&T's side of the POI. AT&T is also charging Halo for certain multiplexing (DS3/DS1, and DS1/DS0).

88. There are three different physical interconnect situations in place today between Halo and AT&T that have POI nuances, but do not fundamentally change the POI arrangement from a cost responsibility stand point. These include:

- a. Halo hand off at the T1 level;
- b. Halo hand off at the DS-3 level, and where Halo's third party service provider provides a DS-3 to DS-1 mux/demux; and
- c. Halo hand off at the DS-3 level, and where Halo has ordered, and AT&T is providing, DS-3 to DS-1 mux/demux.

89. In the first two situations (a) and (b), the POI is either a DSX-1 or DSX-3 cross connect frame owned by Halo's third party service provider. In the third situation (c), the POI can either be considered the DSX-3 cross-connect frame of Halo's service provider, or the DS-3/DS-1 muxing equipment used by AT&T to provide the muxing service Halo has ordered and is receiving from AT&T. But either way, the POI does not extend beyond the DS-1 interface point, and AT&T's responsibility to cross-connect to a DS-1 interface is not changed.

90. The DS-3 to DS-1 muxing/demuxing is done purely for AT&T's convenience; Halo was and is at all times prepared to support DS3 physical layer capability all the way into the tandem switch. Nonetheless, even though Halo could deny cost responsibility in these cases, Halo is paying AT&T for the multiplexing. In other words, these charges are not in dispute. Other than for this DS-3 to DS-1 muxing, AT&T is not providing any transport or multiplexing on Halo's side of the POI. If and to the extent AT&T insists on moving forward with this part of the Complaint, Halo reserves the right to seek a refund for the payments it has made for DS3/DS1 multiplexing.

91. AT&T appears to be attempting to recover charges for DS1/DS0 multiplexing that AT&T performs to knock out 24 DS0s from each cross-connect and then connect to a port on AT&T's tandem switch. This multiplexing is clearly on AT&T's side of the POI. Further, it may well be not even necessary. Most Class 4 tandem switches today have DS3 trunk port interfaces and DS1 interfaces are almost universal. Halo cannot understand why AT&T believes it should, and Halo must pay for, demultiplexing down to the DS0 level to get to the termination on the tandem trunk port. Regardless, the fact is that the DS1/DS0 multiplexing is occurring on AT&T's side of the POI.

92. As detailed above, AT&T's so-called "facility" charges, and the charges subject to dispute, entirely relate to discrete network elements that run from the POI to AT&T's tandem switch, including the de-multiplexing from a valid DS-1 interface to the DS-0 level for tandem trunk port physical termination. All of this is on AT&T's side of the POI, and they relate to "trunks" and "trunk groups." These are not "facilities." Even if cross-connects and multiplexing can be called "facilities," the ICA is crystal-clear that Halo is only responsible for "facilities" up to the POI, and AT&T is responsible for all facilities on its side of the POI.

93. GTC Section IV.A clearly distinguishes between “facilities” and any trunk groups that establish “through connections” between the parties’ switches, and lie on both sides of the POI. “By mutual agreement of the parties, trunk groups arrangements between Carrier and BellSouth shall be established using the interconnecting facilities methods of subsection (B) of this section.” IV.C then goes on to provide, in pertinent part, that “[i]n the event a party interconnects via the purchase of facilities and/or services from the other party, it may do so through purchase of services pursuant to the other party’s interstate or intrastate tariff, as amended from time to time, or pursuant to a separate agreement between the Parties. In the event that such facilities are used for two-way interconnection, the appropriate recurring charges for such facilities will be shared by the parties based upon percentages equal to the estimated or actual percentage of traffic on such facilities, in accordance with Section V1.B below.”

94. This provision is addressing **facilities** and not the trunks that ride on facilities. Again, trunks ride on facilities, and trunks will extend from switch to switch, with a POI somewhere in between. Each party will contribute the facilities that hold the trunk groups and their responsibilities begin and end at the POI.

95. IV.C establishes the “POI” concept, which serves as the location where traffic exchange occurs and where a carrier’s financial responsibility for providing facilities ends and reciprocal compensation for completing the other carrier’s traffic begins. Under the ICA, both parties are responsible for bringing facilities to the POI at their own cost, and do not recover “facility” charges from the other for facility costs unless party A buys a “facility” from party B to get from party A’s network to the POI. Facility costs on the other side of the POI are not recoverable as such; instead, the providing party’s cost recovery occurs through reciprocal compensation.

96. V.C states in pertinent part, “BellSouth and Carrier will share the cost of the two-way trunk group carrying both Parties traffic proportionally when purchased via this Agreement...” The “cost sharing of 2-way trunks based on proportional originating use” concept only applies when Halo uses AT&T-supplied facilities to support trunking as one of the alternatives in IV **to get to the POI**. FCC Rule 51.709(b) and paragraph 1062 of the *Local Competition Order* support this reading. The phrase “between two carrier’s networks” (the FCC rule) and “between its network and the interconnecting carrier’s network” (*Local Competition Order*) both make clear that ILECs cannot impose charges on the ILEC’s side of the POI when the interconnecting carrier does not obtain ILEC facilities on the interconnecting carrier’s side of the POI.

97. AT&T’s Type 2A interconnection implementation process requires the CMRS provider to submit the order, even when part of what is being “ordered” pertains to facilities, trunks and other things on AT&T’s side of the POI and for which the “ordering” carrier is not financially responsible. There is no choice; if the order is not submitted in a way the system likes, the order is rejected. Placement of such orders does not create an obligation on Halo’s part to pay for facilities on AT&T’s side of the POI. More specifically, following the mandatory procedures in AT&T’s OSS cannot somehow constitute a waiver of or amendment to the ICA terms relating to cost responsibility.

98. When the parties were initiating interconnection, there were email exchanges between Halo and AT&T’s service provisioning team on this very subject very early on in the ordering process. Halo expressed willingness to follow AT&T’s process, but also maintained clarity on the POI designation as well as the fact that submitting orders did not change the cost responsibility arrangements in the ICA.

99. AT&T is attempting to shift cost responsibility to Halo when the ICA assigns responsibility to AT&T. Although Halo is paying AT&T for DS3/DS1 multiplexing, Halo at least arguably should not have any cost responsibility for this element and if this case wrongly goes forward Halo should recover the amounts it has paid for DS3/DS1 multiplexing.

100. Regardless, however, AT&T's billings for the cross-connects and any DS1/DS0 multiplexing that Halo has disputed are incorrect and not supported by the ICA. Count IV of the Complaint, AT&T's argument that Halo is in breach of the ICA because Halo has not paid AT&T for facilities, is without any foundation in the ICA and must be denied.

WHEREFORE, PREMISES CONSIDERED, Halo Wireless, Inc. respectfully requests that Counts I, II, and II be dismissed. If and to the extent any count is not dismissed, AT&T's requests for relief must be denied.

Dated this 20th day of January, 2012.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

s/John J. Pringle, Jr.

JOHN J. PRINGLE, JR.

South Carolina State Bar No. 11208

ELLIS, LAWHORNE & SIMS, P.A.

1501 Main Street, 5th Floor

P.O. Box 2285

Columbia, South Carolina 29202

Telephone: 803.343.1270

Fax: 803.799.8479

jpringle@ellislawhorne.com

STEVEN H. THOMAS

Texas State Bar No. 19868890

Application for Admission

Pro Hac Vice Forthcoming

TROY P. MAJOUÉ

Texas State Bar No. 24067738

Application for Admission

Pro Hac Vice Forthcoming

JENNIFER M. LARSON

Texas State Bar No. 24071167

Application for Admission

Pro Hac Vice Forthcoming

McGUIRE, CRADDOCK

& STROTHER, P.C.

2501 N. Harwood, Suite 1800

Dallas, Texas 75201

Telephone: 214.954.6800

Fax: 214.954.6850

W. SCOTT MCCOLLOUGH

Texas State Bar No. 13434100

Application for Admission

Pro Hac Vice Forthcoming

MCCOLLOUGH|HENRY PC

1250 S. Capital of Texas Hwy., Bldg. 2-235

West Lake Hills, Texas 78746

Telephone: 512.888.1112

Fax: 512.692.2522

Attorneys for Halo Wireless, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Partial Motion to Dismiss; Notice of May 16, 2006 Order Confirming Plan of Reorganization for Transcom Enhanced Services and Motion to Dismiss; and Answer* was served via electronic and first-class mail on the following counsel of record on this the 20th day of January, 2012:

Patrick W. Turner, Esquire
General Attorney – AT&T South Carolina
1600 Williams Street, Suite 5200
Columbia, South Carolina 29201

Nanette S. Edwards, Esquire
Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, South Carolina 29201

M. John Bowen, Jr. Esquire
Margaret M. Fox, Esquire
McNair Law Firm, PA
PO Box 11390
Columbia, South Carolina 29211

s/ John J. Pringle, Jr. _____
John J. Pringle, Jr.